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QUESTIONS PRESENTED

This uncomplicated civil action for damages against petitioner, who is President of the United States, for acts committed before he became President, bears no possible relation to his official responsibilities. No showing was made in the district court that the lawsuit, or any aspect of it, would impair the functioning of the presidency. The court of appeals ordered the district court to refrain from "creating scheduling conflicts" for petitioner on remand. The following questions are presented:

1. Whether the court of appeals erred in holding that petitioner was not entitled as a matter of law to a postponement or a stay of all proceedings for the duration of his presidency, when such a postponement or stay would effectively operate as a grant of official immunity for acts beyond "the outer perimeter of [the President's] official responsibility," the limit for presidential immunity set forth in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

2. Whether the court of appeals erred in reversing the district court's grant to petitioner of what the district court termed a "limited or temporary immunity from trial," Pet. App. 68, for acts beyond the outer perimeter of his official responsibility.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1853

WILLIAM JEFFERSON CLINTON,

Petitioner,

—v.—

PAULA CORBIN JONES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

In Arkansas on May 8, 1991, respondent Paula Corbin Jones was a $6.35-an-hour state employee, and petitioner William Jefferson Clinton was the Governor. The complaint alleges that both were at the Excelsior Hotel in Little Rock that day for the Governor's Quality Management Conference. While working at the conference registration desk, Mrs. Jones (Miss Corbin at that time) and a coworker were approached by Danny Ferguson, a state trooper assigned to Governor Clinton's security detail. Trooper Ferguson told Mrs. Jones that "[t]he Governor would like to meet with you" in a suite in the hotel, and gave her a piece of paper with the suite

number written on it. When Mrs. Jones wondered what the Governor wanted, Trooper Ferguson responded: "It's okay, we do this all the time for the Governor." Trooper Ferguson then escorted Mrs. Jones to the Governor's floor. Complaint ¶¶ 6-13.

Mrs. Jones, who had never met the Governor before, entered his suite at his invitation. Small talk followed. Mr. Clinton asked Mrs. Jones about her job. The Governor noted that David Harrington, his appointee who served as the director of Mrs. Jones's agency and her superior there, was his "good friend." The Governor then made a series of verbal and physical sexual advances toward Mrs. Jones, and undressed himself from the waist down. Horrified, Mrs. Jones moved away from Mr. Clinton and said, "Look, I've got to go." Pulling up his pants, Mr. Clinton said, "If you get in trouble for leaving work, have Dave [Harrington] call me immediately and I'll take care of it." As Mrs. Jones left, the Governor looked at her sternly and said: "You are smart. Let's keep this between ourselves." Visibly shaken and upset, Mrs. Jones resumed her post downstairs. In the following hours and days, she told her coworker, friends and relatives about what had happened. Mrs. Jones made no immediate official or public complaint because of fear for her job and for her relationship with her fiancé, and because she felt there was no one to whom she could complain since both her ultimate boss and the police were involved. She remained at her agency for the next twenty-one months, where she both feared and experienced job retaliation for her refusal to submit to Mr. Clinton's advances. In 1993, Mrs. Jones moved to California, and Mr. Clinton became President of the United States. Complaint ¶¶ 14-40, 48.

In January 1994, a widely publicized magazine article reported that, while he was Governor of Arkansas, Mr. Clinton regularly used his state police security detail to solicit women for sex with him. The article, apparently based upon the accounts of various Arkansas state troopers, reported that

an unidentified trooper (clearly Mr. Ferguson) told the magazine that, at Mr. Clinton's request, he had approached a woman named "Paula" and escorted her to Mr. Clinton's room at the Excelsior Hotel. The article reported (again clearly based upon statements of Mr. Ferguson) that Paula had told the trooper that "she was available to be Clinton's regular girlfriend if he so desired," and thus implied that Mrs. Jones was one of the many women who, according to the article, had consensual sexual relationships with Mr. Clinton. Upset that individuals in Arkansas could (and did) identify her as the "Paula" in the article, and angry at the falsehoods that had damaged her reputation, Mrs. Jones publicly stated in February 1994 that she had rebuffed Mr. Clinton's advances and asked that Mr. Clinton acknowledge that fact. Instead, through press spokespersons, Mr. Clinton denied ever having met Mrs. Jones, publicly branded her a liar, and thus further damaged her reputation. Complaint ¶¶ 41-51.

On May 6, 1994, only four months after learning about the damaging magazine article, and after attempting unsuccessfully to obtain an acceptable statement by Mr. Clinton to settle the matter and to restore her reputation, Mrs. Jones filed suit against Mr. Clinton and Mr. Ferguson in the United States District Court for the Eastern District of Arkansas. Alleging the facts summarized above, her complaint asserts a claim under 42 U.S.C. § 1983 (1994) that Mr. Clinton, acting under color of state law, violated her constitutional rights to equal protection and due process by sexually harassing and assaulting her, as well as a claim under 42 U.S.C. § 1985 that Mr. Clinton and Mr. Ferguson had conspired to violate those rights. Her complaint also asserts two claims under Arkansas common law, one for intentional infliction of emotional distress against Mr. Clinton, and one for defamation against both Mr. Clinton and Mr. Ferguson. Complaint ¶¶ 58-79.

Mr. Ferguson's answer to complaint admitted, among other things, "traveling in an elevator with plaintiff Paula Jones and pointing out a particular room of the hotel." Ferguson Answer

¶ 11. He disclaimed any "personal knowledge of what took place in the hotel room." *Id.* ¶ 14.

Mr. Clinton did not answer the complaint, but instead requested and obtained an order allowing him to defer a response pending a motion to dismiss on grounds of "presidential immunity." Pet App. 40. On August 10, 1994, he filed what he called a "Motion to Dismiss on Grounds of Presidential Immunity." *See* Pet. App. ii. Citing the same principal authorities he cites here, Mr. Clinton argued that "immunity for the duration of the President's tenure is constitutionally mandated in the instant case." Memorandum in Support of President Clinton's Motion To Dismiss on Grounds of Presidential Immunity 6, *Jones* v. *Clinton*, Civil Action No. LR-C-94-290 (E.D. Ark. filed Aug. 10, 1994). As the district court noted, Mr. Clinton's claim "that he may not be sued in a civil action while sitting as President, even when the facts asserted by the Plaintiff occurred, if at all, before he was elected or assumed the office," is "a claim of absolute immunity." Pet. App. 55. Mr. Clinton argued that the complaint should be dismissed without prejudice to being refiled after he leaves the White House; in the alternative, he argued that the district court should stay the case until that time. Pet App. 55.

Mr. Clinton's motion was predicated simply upon his occupancy of the Office of President of the United States. He made no factual showing that any aspect of the pretrial or trial proceedings would hinder him from carrying out the duties of that Office.

The district court denied the substance of Mr. Clinton's motion on December 28, 1994. Pet. App. 54. Rejecting Mr. Clinton's immunity claim, the court denied the motion to dismiss, and observed that "[n]owhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support . . . be found" for Mr. Clinton's claim that he has "immunity from civil causes of action arising prior to [his] assuming the office" of the presidency. Pet.

App. 68. The court found Mr. Clinton's contention to be "contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law." Pet. App. 68. Nevertheless, in a self-contradictory holding that was apparently premised upon isolated language in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), the district court granted Mr. Clinton what it called a "limited or temporary immunity from trial," Pet. App. 68; *see also id.* at 70 (noting that its holding "amounts to the granting of temporary or limited immunity from trial as *Fitzgerald* seems to require"). Without offering any reason why a trial, however brief and properly managed, would interfere with Mr. Clinton's official duties, the court ordered an indefinite postponement of the trial against both Mr. Clinton *and* Mr. Ferguson pending the completion of Mr. Clinton's term in office, whether that be 1997 or 2001. Pet. App. 68-71. The court nonetheless held that discovery could proceed because "[t]here would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself." Pet App. 71.

Mr. Clinton appealed the rejection of his full immunity defense, Mrs. Jones cross-appealed the grant of "limited or temporary immunity from trial," and on February 24, 1995, the district court ordered a stay of all proceedings, including discovery, pending the appeal. Pet. App. 74. Mr. Clinton asserted that appellate jurisdiction existed under the rule that "denials of immunity are subject to appeal as of right under section 1291 [and] the collateral order doctrine." Opening Brief of Appellant President William Jefferson Clinton 10, 23, *Jones* v. *Clinton*, No. 95-1050 (8th Cir. filed Apr. 5, 1995).

On January 9, 1996, a divided panel of the Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. Pet. App. 1. The Eighth Circuit held that nothing in the Constitution or in this Court's immunity case law lent support to Mr. Clinton's claim of immunity, as there had *never*

been "any case in which any public official . . . has been granted any immunity from suit for his *unofficial* acts." Pet App. 7 (emphasis added). The court of appeals noted that this Court's decision in *Nixon* v. *Fitzgerald* recognized a presidential immunity that extended only to " 'acts within the 'outer perimeter' of [the President's] official responsibility,' " and that "unofficial acts" are "[b]y definition . . . not within the perimeter of the President's official responsibility at all, even the outer perimeter." Pet. App. 8-9 (quoting *Fitzgerald*, 457 U.S. at 756). The court concluded that *Fitzgerald*'s rationale—"that, without protection from civil liability for his *official* acts, the President would make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid lawsuits and personal liability"—is "inapposite where only personal, private conduct by a President is at issue." Pet. App. 11 (emphasis added). The district court's denial of Mr. Clinton's motion to dismiss was accordingly affirmed.

The court of appeals reversed the district court's grant of a "limited or temporary immunity from trial" for the same reasons. While recognizing that "[t]he trial court has broad discretion to control the scheduling of events in matters on its docket," Pet. App. 13 (footnote omitted), the court of appeals held that, to the extent the district court's ruling could be characterized as an attempt to exercise that discretion, it was an "abuse of discretion" because it was "the functional equivalent of a grant of temporary immunity to which . . . Mr. Clinton is not constitutionally entitled," *id.* at. 13 & n.9. The court of appeals stressed that the district court had considerable power to ensure that the litigation would not interfere with Mr. Clinton's official duties, and that the district court was to engage in "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule," Pet. App. 13:

> We have every confidence that the District Court will exercise its [scheduling] discretion in such a way that this lawsuit may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties. . . .
>
> If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities. . . .
>
> The discretion of the courts in suits such as this one comes into play, not in deciding on a case-by-case basis whether a civil complaint alleging private wrongs is sufficiently compelling so as to be permitted to proceed with an incumbent President as defendant, but in controlling the scheduling of the case as necessary to avoid interference with specific, particularized, clearly articulated presidential duties. If the trial preliminaries or the trial itself become barriers to the effective performance of his official duties, Mr. Clinton's remedy is to pursue motions for rescheduling, additional time, or continuances.

Pet. App. 13-16.

Judge Beam, concurring, emphasized that Mr. Clinton had failed to point out *any* "specific hardship or inequity" that would justify any stay of the litigation under this Court's decision in *Landis* v. *North American Co.*, 299 U.S. 248, 254-56 (1936). Pet. App. 20. Judge Beam observed that Mr. Clinton had "greatly overstated" the potential for "interbranch interference" that would result if the lawsuit were allowed to proceed. Pet. App. 21. Citing numerous occasions upon which past Presidents had given testimony, Judge Beam explained that the potential for such interference in this particular case

was "not appreciably greater than those faced in many other instances in which a sitting President interfaces as a party, witness, or target with the judicial and legislative branches of the government." Pet. App. 22. He concluded:

> Mrs. Jones's complaint presents relatively uncomplicated civil litigation, the discovery for which can and should be carried out with a minimum of impact on the President's schedule. It is doubtful, for instance, that more than one, perhaps two, face-to-face pretrial encounters between the President and Mrs. Jones's representatives need to occur. Indeed, there is not even a requirement that parties be present at the trial of civil litigation and with some frequency they are not. At the bottom line, the availability of written interrogatories, written requests for admissions and written stipulations of undisputed facts, as allowed by the Federal Rules of Civil Procedure, would indicate that the actual impact of this litigation on the duties of the presidency, if that is Mr. Clinton's real concern, is being vastly magnified, especially assuming the trial judge's careful supervision of the litigation with maximum consideration of the President's constitutional duties. . . .
>
> As I have attempted to stress, *nothing [in our decision] prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled.*

Pet. App. 23-25 (emphasis added).

SUMMARY OF ARGUMENT

Mr. Clinton asks for the recognition of an entirely unprecedented presidential immunity, a purely personal privilege against lawsuits that have nothing to do with official, presidential duties. Nothing in *Nixon* v. *Fitzgerald*, 457 U.S. 731

(1982), or in this Court's immunity case law, however, supports his theory. The essential rationale of official immunity is that the imposition of personal damages liability on public officials for official acts would cause them to "hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals.' " *Id.* at 744-75 (citation omitted). As a consequence, presidential immunity was limited in *Fitzgerald* to "acts within the *'outer perimeter'* of [the President's] *official responsibility*," *id.* at 756 (emphasis added), and Chief Justice Burger's concurring opinion in that case made clear that Presidents "are *not* immune for acts outside official duties," *id.* at 759 (Burger, C.J., concurring). The claim that *Fitzgerald* supports protection for unofficial acts is based upon language taken out of context.

Mr. Clinton's other authorities do not support his immunity claim. The Framers did not intend to place the President above the law, and thus did not confer upon Presidents any personal privileges akin to those of a monarch who is sovereign in both person and office. Nor do *United States* v. *Burr*, 25 F. Cas. 30, 187 (C.C.D. Va. 1807) (Nos. 14,692d and 14,694), and *United States* v. *Nixon*, 418 U.S. 683 (1974), support immunity. They simply stand for the proposition that confidential and official presidential communications are presumptively protected by executive privilege, which may nonetheless be overcome upon a sufficient showing of need. Here, no official acts or confidential communications are involved, and no balancing of interests between privilege and need is required. This Court's cases, indeed, have always limited Presidential privileges to official communications and acts, and there is no reason to abandon that course here.

Nor is Mr. Clinton's immunity claim supported by separation-of-powers principles. He made no showing below that this case will actually prevent him from carrying out his duties. Nor could he, given the manifest simplicity of the case. Mr. Clinton is thus reduced to the contention that in general, litigation (including a hypothetical torrent of future

cases) will always interfere with Presidential duties. Mr. Clinton overstates the vulnerability of his Office's work to civil litigation involving unofficial actions. In addition, Mr. Clinton also overstates a supposed danger that a trial court, by engaging in "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule," as the court of appeals directed, Pet. App. 13, will somehow interfere with the functioning of the Executive Branch.

ARGUMENT

I. THE TEMPORARY PRESIDENTIAL IMMUNITY ASSERTED BY PETITIONER IS LEGALLY INSUPPORTABLE AND IS UNNECESSARY TO PROTECT THE INTERESTS OF THE PRESIDENCY.

A. The immunity case law does not support petitioner's immunity claim.

Mr. Clinton, the Government, and the academic *amici* supporting him ask this Court to create a heretofore unrecognized presidential immunity: a purely personal privilege against lawsuits that have nothing to do with official, presidential duties. They argue that, even in cases having nothing to do with official action of any kind, "private civil damages litigation against an incumbent president must, in all but the most exceptional cases, be deferred until the president leaves office." Pet. Br. 11. And while Mr. Clinton now shies away from using the word "immunity" to describe the relief he seeks, the academic *amici* supporting him candidly do not. As they explain, the gist of Mr. Clinton's claim is that "*Nixon* v. *Fitzgerald* supports a temporary Presidential immunity for civil litigation even for claims based on private conduct." Br. *Amicus Curiae* of Law Profs. In Supp. of Pet. 11. Mr. Clinton and his *amici* indeed rely principally upon the leading presidential immunity case, *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), which, they say, recognizes that, regardless of the

basis of the claim, "one [cannot] hale an incumbent President into court and seek damages from him personally," Pet. Br. 17, and "indicates that the instant suit should be deferred," Br. for United States as *Amicus Curiae* 4. Neither the *Fitzgerald* holding nor its rationale, however, supports the extraordinary and novel immunity claim advanced here.

In *Fitzgerald*, a five-Justice majority of this Court held that Presidents are entitled to an absolute immunity for suits for civil damages relating to any of their official acts. Four Justices dissented, arguing that presidential immunity should be limited only to particular functions performed by the President. Both the majority and concurring opinions made clear that the President's official immunity only forecloses "damages liability for acts within the *'outer perimeter'* of [the President's] *official responsibility*." *Fitzgerald*, 457 U.S. at 756 (emphasis added). Chief Justice Burger explained that presidential immunity covers only *official* actions and "*does not extend beyond such actions*"—that "a President, like Members of Congress, judges, prosecutors or congressional aides . . . [is] *not* immune for acts outside official duties." *Id.* at 761 n.4, 759 (Burger, C.J., concurring; emphasis added). That very limitation, Chief Justice Burger observed, was precisely why the Court's decision did not "place[ ] a President 'above the law,' " as the dissent had vigorously argued. *Id.* (Burger, C.J., concurring); *see id.* at 766-67 (White, J., dissenting); *id.* at 797 (Blackmun, J., dissenting).

The limitation of immunity to official acts is backed by a long and unbroken line of authority cited in *Fitzgerald*. As Judge Learned Hand once explained, "[t]he decisions have, indeed, *always* imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (emphasis added), *cert. denied*, 339 U.S. 949 (1950). The essential rationale of immunity is that imposing personal liability for *official* acts would distort official judgment or make officials unwilling to act. Thus, *Fitzgerald* observed that,

"[i]n the absence of immunity, . . . executive officials would hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals,' even when the public interest required bold and unhesitating action." *Fitzgerald*, 457 U.S. at 744-45 (quoting *Spalding* v. *Vilas*, 161 U.S. 483, 499 (1896)). The Court cited "the prospect that damages liability may render an official unduly cautious in the discharge of his official duties" as being "[a]mong the most persuasive reasons supporting official immunity." *Id.* at 752 n.32. Immunity, the Court explained, was necessary to "provid[e] an official 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)).[1]

In following this central rationale undergirding this Court's immunity cases, *Fitzgerald* held that official immunity could only be invoked as a defense in litigation involving official acts:

> Applying the principles of our cases to claims of this kind, we hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his *official* acts.
>
> * * *
>
> In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts *within the 'outer perimeter' of his official responsibility.*

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[1] *See also, e.g., Mireles* v. *Waco*, 502 U.S. 9, 10-11 (1991) (per curiam) (judges immune for judicial acts so that they may act in official capacity without apprehension of personal liability); *Forrester* v. *White*, 484 U.S. 219, 226-29 (1988) (same); *Butz* v. *Economou*, 438 U.S. 478, 504-17 (1978) (same for executive agency officials); *Imbler* v. *Pachtman*, 424 U.S. 409, 424-31 (1976) (state prosecutors); *Scheuer* v. *Rhodes*, 416 U.S. 232, 240-49 (1974) (state executive officials); *Tenney* v. *Brandhove*, 341 U.S. 368, 376-79 (1951) (state legislators); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 347-53 (1872) (judges).

Id. at 749, 756 (emphasis added). These words were not mere dicta. Sharply disputed in *Fitzgerald* was the issue of which acts were to be subject to immunity. The Court noted that, in the past, it had linked absolute immunity to particular official functions: "Frequently our decisions have held that an official's absolute immunity should extend only to acts in performance of particular functions of his office." *Id.* at 755. But because of the variety of functions performed by the President, the Court selected the broadest scope of absolute immunity recognized in the case law: immunity "for acts within the 'outer perimeter' of . . . official responsibility." *Id.* at 756; *see, e.g., Spalding* v. *Vilas*, *supra*, 161 U.S. at 498; *Barr* v. *Matteo*, 360 U.S. 564, 575 (1959). The Court then applied its holding to the facts of the case. Citing a specific provision of the United States Code, it held that the alleged conduct for which President Nixon had been sued indeed fell within the outer perimeter of presidential responsibility. *Id.* at 757.

Conceding, as he must, that "[t]his case is different from *Fitzgerald* . . . in that it largely does not touch upon official actions," Mr. Clinton nevertheless contends that "[t]he logic of *Fitzgerald* compels the conclusion that incumbent Presidents are entitled to the much more modest relief sought here—the temporary deferral of private civil litigation." Pet. Br. 20. In support of this argument, Mr. Clinton points to two sentences in a single paragraph of *Fitzgerald*: one sentence stating that "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government"; and another stating that "the sheer prominence of the President's office [cannot] be ignored." *Fitzgerald*, *supra*, 457 U.S. at 751-53, *quoted in* Pet. Br. 20. This language, the argument goes, applies as fully to lawsuits involving private conduct as to those involving official conduct, and so requires recognition of the temporary immunity sought here. *See* Pet. Br. 20-21; *sce also* Br. *Amicus Curiae* of Law Profs. In Supp. of Pet. 10; Br. for United States 16.

Mr. Clinton misreads *Fitzgerald* because, as even the Government admits, "[w]hen the President is sued for actions wholly unrelated to his official responsibilities, *Fitzgerald*'s concern for ensuring 'fearless[ ] and impartial[ ]' Presidential decision making is not directly implicated." Br. for United States 15. The language upon which Mr. Clinton relies simply cannot be stripped from the context of that concern. Indeed, it comes from the Court's explanation of why the absolute immunity given to "prosecutors and judges," rather than the qualified immunity given to "governors and cabinet officers," was appropriate for the President's official actions, *Fitzgerald*, 457 U.S. at 750-51; and it makes clear that the "unique risks to the effective functioning of government" to which the Court referred stemmed from private lawsuits concerning *official* acts. The Court said that the overriding policy consideration underlying official immunity—that lawsuits over official acts might compromise an official's " 'ability to deal fearlessly and impartially with' the duties of his office," 457 U.S. at 752 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979))—applied with greater force to the President because (1) the President's official acts were more likely to be controversial ones affecting "countless people" than those of other officials, and (2) the President's "sheer prominence" made him the most likely target for suits about controversial official acts of the Executive Branch. Thus, the relevant portion of the Court's opinion reads as follows:

> In arguing that the President is entitled only to qualified immunity, the respondent relies on cases in which we have recognized immunity of this scope for governors and cabinet officers. *E.g.*, *Butz* v. *Economou*, 438 U.S. 478 (1978); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). We find these cases to be inapposite. The President's unique status under the Constitution distinguishes him from other officials.
>
> Because of the singular importance of the President's duties, diversion of his energies by concern with private

> lawsuits would raise unique risks to the effective functioning of government. *As is the case with prosecutors and judges—for whom absolute immunity now is established—a President must concern himself with matters likely to "arouse the most intense feelings." Pierson* v. *Ray*, 386 U.S., at 554. *Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the duties of his office. Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979). *This concern* is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the presidency was designed to serve.

457 U.S. at 751-53 (footnotes omitted; emphasis added). In short, the Court reasoned that the President was potentially more vulnerable than other officials to lawsuits for *official* acts, and that absolute, not qualified, immunity should therefore apply to those acts.

The Court's reasoning in *Fitzgerald* thus has no application to the case at bar. As the court of appeals concluded, "[i]t is clear from a careful reading of *Fitzgerald*" that this Court was "concern[ed] that the President's awareness of his essentially infinite potential personal liability for virtually every official action he takes would have an adverse influence on the presidential decision-making process," and might cause the President to "make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid

lawsuits and personal liability." Pet. App. 11. No such dangers arise, of course, from suits relating to personal conduct. Imposing liability for pre-presidential or other unofficial conduct will simply not cause Presidents to "hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals.' " *Fitzgerald*, 457 U.S. at 744-45 (quoting *Spalding* v. *Vilas*, 161 U.S. at 499). It will not diminish a President's " 'ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)). It will not place the President " 'under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages.' " *Id.* at 745 (quoting *Spalding*, 161 U.S. at 498). And it will not require any court "to probe into the elements of Presidential decisionmaking," or to engage in "judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information." *Id.* at 761-62 (Burger, C.J., concurring).

B. Petitioner's immunity claim would be contrary to the intention of the Framers, is not supported by any decisions of this Court, and would place petitioner above the law.

Mr. Clinton also contends that allowing this litigation to proceed would run contrary to the "teaching of the Framers," Pet. Br. 15, and would contravene both "historical doctrine" and "traditional practice," *id.* at 17. To the contrary, the Framers did not intend to place the President above the law, and did not invest the President with any personal privileges akin to those of the English King. As the district court wrote, "[n]owhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any support . . . be found" for giving the President special protection from "civil causes of action arising prior to assuming the office." Pet App. 68. Mr. Clinton's claim is simply "contrary to our form

of government." *Id.* Indeed, to the extent that there is any "traditional practice" on the point at all, it is that lawsuits involving a President's unofficial acts must be allowed to proceed.

The Framers believed that every constitutional power and every constitutional actor must be constrained. "Federalists and antifederalists both agreed . . . that no one should ever be entrusted with unqualified authority." Bernard Bailyn, *The Ideological Origins of the American Revolution* 368 (1992). Having fought to escape the reign of a king whose power was unchecked, they were certain "that any release of the constraints on the executive—any executive—was an invitation to disaster." *Id.* at 379 (citing remarks of Edward Rutledge); *see also* 4 Jonathan Elliot, *The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention of Philadelphia in 1787* 276 (2d ed., reprinted 1987).

As a result, the Framers adhered to a notion reflected time and again in this Court's decisions: "No man in this country is so high that he is above the law." *United States* v. *Lee*, 106 U.S. 196, 220 (1882). It was understood that the President had no personal privileges beyond those of an ordinary citizen:

> *His person is not so much protected as that of a member of the house of representatives; for he may be proceeded against like any other man in the ordinary course of law.*

An American Citizen (Tench Coxe) I, Independent Gazetteer (Philadelphia) September 26, 1787, reprinted in I Bernard Bailyn, ed., *The Debate on the Constitution* 20, 24 (1993) (emphasis in original). As Charles Coatsworth Pinckney, an important Framer, explained on the Senate floor only a few years after the Constitution's adoption, the Framers

> well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here.

Annals of Congress, March 5, 1800, at 72. Pinckney continued:

> let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. Why should the individual members of either branch, or either branch itself, have more privileges than him? . . . The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more.

Id. at 74; *cf. Nixon* v. *Fitzgerald*, *supra*, 457 U.S. at 755 (immunity must be "closely related to [its] justifying purpose," and "the sphere of protected action must be related closely to the immunity's justifying purpose"). Similarly, James Wilson explained that the President

> is placed high, and is possessed of power far from being contemptible; *yet not a single privilege is annexed to his character*; far from being above the laws, *he is amenable to them in his private character as a citizen*, and in his public character by impeachment.

2 Elliot, *Debates on the Federal Constitution*, *supra*, at 480 (emphasis added and omitted).

Mr. Clinton's own description of the historical record only serves to confirm the district court's conclusion that he has no credible support for his claim. As he did below, Mr. Clinton relies primarily upon Justice Story's isolated statement that a President's "person must be deemed, in civil cases at least, to possess an official inviolability." Pet. Br. 16 (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1563, pp. 418-19 (1st ed. 1833)). By its terms, however, Justice Story's statement referred only to the President's

"*official* inviolability," and described only the protections for actions taken by a President "*while he is in the discharge of the duties of his office*," *id.* (citation omitted), and thus goes no farther than *Nixon* v. *Fitzgerald*, which did not recognize any "immun[ity] for acts *outside* official duties," *Fitzgerald*, 457 U.S. at 759 (Burger, C.J., concurring). Beyond this, Justice Story was referring only to a presidential privilege from "arrest, imprisonment, or detention"—none of which, of course, is involved here—and the "official inviolability" he described was only for "*this* purpose." Pet Br. 16 (citation omitted; emphasis added).[2] And as for Mr. Clinton's citation of Presidents Adams and Jefferson to the effect that "the President personally is not subject to any process whatsoever," Pet. Br. 16, that view was refuted by Chief Justice Marshall early in our Nation's history in *United States* v. *Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694) ("That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted"). *See also Nixon* v. *Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc; per curiam) (noting that Chief Justice Marshall "squarely ruled that a subpoena may be directed to the President).[3] It is thus now

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[2] An ordinary modern civil case, of course, presents no danger of arrest, imprisonment or detention of the defendant. Accordingly, the debate over whether a "President must be impeached and removed from office before he can be prosecuted" for a crime, Pet. Br. 14-15 & n.11; *see also* Br. for United States 15 n.8, is irrelevant here.

[3] In fact, the Jefferson letter that Mr. Clinton quotes was one in which President Jefferson was expressing his criticisms of the Chief Justice's decision in *Burr*. *See Fitzgerald*, 457 U.S. at 751 n.31; *see also* Bradford E. Biegon, Note, *Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone's* Commentaries, 82 Va. L. Rev. 677, 698 & nn.127-28 (1996) ("Jefferson's close of the letter is illustrative of the distemper that Marshall's opinion must have caused him").

As for President Adams, he is almost universally regarded as an exponent of an excessively expansive view of executive power. He was regarded by most of his contemporaries as being almost a monarchist. *See*

"settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President." *Nixon* v. *Fitzgerald*, 457 U.S. at 753-54.

The law ever since Chief Justice Marshall's pronouncement in *Burr*, *supra*, supports not a distinction between testimony in criminal and testimony in civil cases, as Mr. Clinton contends (*see*, *e.g.*, Pet. Br. 17, 26-27), but a line between matters that pertain to the President's official duties and those that do not—in other words, precisely the line followed in *Fitzgerald*. Thus, in *Burr*, Chief Justice Marshall observed that the President was "subject to the general rules which apply to others," and recognized *only* a privilege "to withhold private letters . . . written . . . in consequence of [the President's] public character, and may relate to public concerns." *Burr*, 25 F. Cas. at 191-92. Similarly today, the threshold issue of whether there is a presidential privilege turns not upon whether a proceeding is civil or criminal, but upon the nature of the materials subpoenaed. When faced with a subpoena, a President may "legitimately assert privilege, of course, *only* to those materials whose contents fall within the scope of the privilege recognized in *United States* v. *Nixon*"—which is "limited to communications 'in performance of [a President's] responsibilities,' 'of his office,' and made 'in the process of shaping and making decisions.' " *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 449 (1977) (quoting *United States* v. *Nixon*, 418 U.S. 683, 711, 713, 708 (1974)). Only if that stringent test is met is there a "presumptive privilege." *United States* v. *Nixon*, 418 U.S. at 708. But even this presumptive privilege may be overcome, since the interests of the Executive Branch must be balanced against "our historic commitment to the rule of law," which "depend[s] on full disclosure of all the facts, within the framework of the rules evidence." *Id.* at 709. Only when that balancing is required—where *official* acts and communications are at issue—does it

W. Page Smith, *John Adams* 755 (1962); *see also* Biegon, *supra*, 82 Va. L. Rev. at 696.

become relevant whether a judicial proceeding is civil or criminal in nature. *See id.* at 707-13.

Thus, the executive privilege recognized by this Court in *United States* v. *Nixon* in no way supports Mr. Clinton's argument. Executive privilege is analogous to the protection recognized in *Nixon* v. *Fitzgerald*, and its limitations are similar. Both protections are designed to preserve the presidential decision-making process, and both are narrowly crafted to achieve that end. Executive privilege is necessary because "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *United States* v. *Nixon*, 418 U.S. at 708. Because official conduct and communications are not involved here, there is no warrant to engage in the balancing of interests required in *United States* v. *Nixon*, and no basis to hold that there must be Sixth Amendment interests at stake for this litigation to proceed.[4] This case would no more threaten "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking," *id.*, than it would threaten to cause Presidents "to hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals,' " *Nixon* v.

[4] Mr. Clinton is accordingly wrong to suggest that *United States* v. *Nixon* can be read as implying that the testimony of someone serving as President cannot be compelled in "civil proceedings." Pet. Br. 27. The Court simply left open the question whether the presumptive *executive privilege* for executive communications could be overcome in civil proceedings. *See Nixon*, 418 U.S. at 711-12 & n. 19. Here, of course, there is no question of privilege, and therefore no need to look to whether the need to produce evidence in a civil case may be overcome by the need to protect the privacy of official presidential deliberations. Similarly, Mr. Clinton's observation that the Court in *Nixon* twice quoted Chief Justice Marshall's statement that "[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual," Pet. Br. 27 (quoting *Nixon*, 418 U.S. at 708, 715 (quoting *Burr*, 25 F. Cas. at 192)) is beside the point: both Chief Justice Marshall in *Burr* and the *Nixon* Court were addressing the question of how claims of executive privilege must be handled by the courts.

Fitzgerald, 457 U.S. at 744-75 (quoting *Spalding* v. *Vilas*, 161 U.S. at 498-99).

This Court has recognized the distinction between official and unofficial acts when determining the President's amenability to suit in contexts other than civil damages actions as well. The judiciary "has no jurisdiction of a bill to enjoin the President in the performance of his official duties," *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 500-01 (1866); the courts "cannot direct the President to take a specified executive act," *Franklin* v. *Massachusetts*, 505 U.S. 788, 829 (1992) (Scalia, J., concurring in part and in judgment). This rule serves the same functions as the immunity recognized in *Fitzgerald*, *see Franklin*, 505 U.S. at 827-28 (Scalia, J., concurring in part and in judgment), and is likewise expressly limited to official acts. Indeed, in *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) at 501, "the bill contain[ed] a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee." In responding to this contention, the Court did not dispute that injunctive proceedings could be had against a citizen serving as President. Rather, the Court held that what was prohibited was "relief *as against the execution of an Act of Congress* by Andrew Johnson"—an injunction relating to the President's *official* acts. *Johnson*, 71 U.S. (4 Wall.) at 501 (emphasis added).

Finally, there is no support for Mr. Clinton's claim that the paucity of cases against Presidents for unofficial acts is due to a "nearly universal understanding that such litigation is inconsistent with our constitutional scheme." Pet. Br. 18. There has been no such understanding. None of the prior Presidents who were sued for nonpresidential acts (Presidents Theodore Roosevelt, Harry Truman, and John Kennedy) asserted any immunity claim. Pet. App. 14 n.10.[5] And President Nixon *twice* conceded to this Court that Presidents could indeed be sued for nonpresidential acts: first, at oral argument in *United States* v. *Nixon*, *supra*, and then later, in his briefs in *Nixon* v. *Fitzgerald*, *supra*.[6] In any event, the understanding reflected in Mr. Clinton's brief is that such litigation may indeed be brought, but must be stayed. If *that* were the universal historical understanding, then plaintiffs with claims against Presidents for unofficial acts would not have withheld their claims, but would have *asserted* them to preserve their timeliness, even if the claims were going to be stayed.

In short, to create a blanket rule protecting a President from litigation relating to his unofficial acts would cross a line that this Court has never crossed and that the Framers never contemplated would be crossed. It would create the first purely personal presidential privilege. It would provide, as the court of appeals noted, a "degree of protection from suit for

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[5] President Kennedy attempted to obtain a stay under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993), Pet. App. 14 n. 10, but the state trial court denied his motion, which was plainly meritless in light of this Court's decision in *Boone* v. *Lightner*, 319 U.S. 561 (1943).

[6] At oral argument in *United States* v. *Nixon*, White House Special Counsel James D. St. Clair expressly conceded that presidents could be sued for their unofficial conduct in personal matters:

> QUESTION: A president could be sued, couldn't he, for back taxes or penalties or what not?
>
> MR. ST. CLAIR: Well, in questions of immunity I think individually he could be . . . I think the President could be sued for back taxes in his individual capacity. But in terms of his power to effect the responsibilities of his office, to protect the presidency from unwarranted intrusions into the confidentiality of his communications, that's not a personal matter.

Transcript of Oral Argument at 80, *United States* v. *Nixon*, Nos. 73-1766 and 73-1834 (U.S. argued July 8, 1974).

President Nixon made the same concession in his reply brief in the *Fitzgerald* case. He stated that it was "clear that a President, in his capacity as a citizen, *always remains subject to suit for private wrongs*, but for improper actions as President, whether denominated 'political' or of a 'public character,' impeachment is the intended remedy." Reply Brief for Petitioner Richard Nixon at 8-9 n.6, *Nixon* v. *Fitzgerald*, No. 79-1738 (U.S. filed Nov. 20, 1981) (emphasis added).

his private wrongs enjoyed by no other public official (much less ordinary citizens)." Pet. App. 13. It would violate the precept that "[n]o man in this country is so high that he is above the law," *United States* v. *Lee*, *supra*, 106 U.S. at 220, or, as President Theodore Roosevelt said, that "[n]o man is above the law, and no man is below it; nor do we ask any man's permission when we require him to obey it."[7]

This is so even though the relief sought here is termed a "temporary deferral," Pet. App. 13, as opposed to dismissal. For far from being a brief delay, Mr. Clinton's requested "deferral" may be very long indeed. This action was commenced in 1994, and discovery is currently stayed by order of the District Court, Pet. App. 74. If Mr. Clinton is reelected, and if his temporary immunity claim is upheld, *discovery* would not even begin until early 2001—almost *seven years* after the claim was first brought. As for a claim more complex than Mrs. Jones's that is brought at the beginning of a two-term President's service in office, it is likely that more than a *decade* (and possibly more) would pass before the claim is tried, and perhaps more than *dozen* years would pass before any judgment became final on appeal.

Even in an age of heavy dockets, delays of such length are extraordinary, and by any standard exceed the "bounds of moderation," *Landis* v. *North American Co.*, 299 U.S. 248 (1936); indeed, as any unbiased litigator would attest, they are a defendant's dream. For under Mr. Clinton's proposed scheme of "deferral," a President may, in his capacity as an ordinary citizen, fail to meet a contractual covenant, or to pay a debt; he may commit a battery or a trespass or other tort, or commit any type of civil violation of law; and yet, unlike any other citizen, for a period of possibly eight years or even more, he is privileged not to pay any judgment, to submit to

[7] John Bartlett, *Familiar Quotations* 687 (15th ed. 1980). With more spice as an apt egalitarian principle, is Montaigne's aphorism that "on the highest throne in the world, we still sit only on our own bottom." *Id.* at 166.

a trial, to give a deposition, to produce any document, or even to admit or to deny any of the allegations of a complaint. During this period of many years, evidence inevitably will be lost, as witnesses become unavailable, memories fade, and documents are mislaid or destroyed, all to the likely detriment of the plaintiff, who still must bear the burden of proof. If such delay were commanded by law, a plaintiff might be wise not to bother to assert even the strongest of claims. And in a case such as this, where the plaintiff seeks vindication for damage to her reputation, no amount of prejudgment interest will compensate for any delay. The presumptive "deferral" rule sought by Mr. Clinton is indeed a special privilege or "immunity"—which is why Mr. Clinton repeatedly described it as such throughout the proceedings below.

Mr. Clinton's description of stays in other litigation contexts only serves to confirm the extraordinary nature of the privilege he seeks here. With one execption—the stay provision in the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993) (Pet. Br. 36)—each of the examples of stays he cites are ones required in order to allow *other* judicial or administrative cases to proceed. And none of these examples involves the creation of a special, personal privilege. Thus, the automatic bankruptcy stay (Pet Br. 34-35), which is the product of a statute, 11 U.S.C. § 362 (1994), serves to allow claims to be immediately addressed in the bankruptcy forum; and it affords protection not only to debtor-defendants but to claimant-plaintiffs, by preserving the value of the bankrupt estate. And as for the protection afforded debtors, it is available to any person who may file a bankrupcy petition—and not to a special privileged class of one. Similarly, the stay of civil litigation in favor of criminal litigation (Pet. Br. 35) serves the interests of justice, judicial economy, and constitutional rights such as the privilege against self-incrimination, and, through the doctrines of res judicata or collateral estoppel, may even benefit the civil plaintiff. And facilitating the conduct of criminal litigation

against the defendant hardly amounts to a privilege for the defendant. The doctrine of primary jurisdiction (*id.* at 36) likewise serves the interests of economy, and does not place any citizen above any other in the eyes of the law. Finally, a stay of proceedings pending appeal (*id.*), like that entered here, is hardly unique to official-immunity litigation; it serves to preserve an issue for appellate review and creates no privilege for anyone.

As for the Soldiers and Sailors' Civil Relief Act, its stay procedure was expressly created by Congress, which could have just as easily granted relief to Presidents, but has not. In any event, as this Court has held, stays under that Act are not to be liberally granted; for example, "[t]he Act cannot be construed to require continuance on [a] mere showing that the defendant was in Washington in the military service," *Boone v. Lightner*, 319 U.S. 561, 565 (1943), and thus could not help Mr. Clinton even if the Act's military-service requirement could be ignored. Unlike the examples he cites, the relief Mr. Clinton seeks is indeed extraordinary, and would unquestionably provide a "degree of protection from suit for . . . private wrongs enjoyed by no other public official (much less ordinary citizens)." Pet. App. 13. Indeed, as the example of the Soldiers and Sailors' Civil Relief Act shows, any such protection should not be for the courts to create, but for Congress to enact.

C. Petitioner's claim of temporal immunity cannot be justified under Article II or the separation of powers.

Mr. Clinton and *amici* also contend that Article II and separation-of-powers principles establish the temporary immunity from suit that he seeks. To make out a separation-of-powers violation under this Court's cases, however, Mr. Clinton must demonstrate how proceeding with this litigation would cause the "encroachment or aggrandizement of one branch at the expense of the other,' " *Metropolitan*

Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273 (1991) (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)), or would otherwise "prevent[ ] the Executive Branch from accomplishing its constitutionally assigned functions,' " *Mistretta v. United States*, 488 U.S. 361, 383, 384 (1989) (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). Mr. Clinton's burden of showing a separation-of-powers violation, or showing that a stay of all proceedings is otherwise justified, is unmet. Nor is a blanket temporary-immunity protection required in *every* personal action against the President as a matter of law.

1. This simple civil case will not prevent the Executive Branch from accomplishing its constitutionally assigned functions.

As the court of appeals observed, Mr. Clinton has presented a "sweeping claim that this suit . . . will violate the constitutional separation of powers doctrine . . . without detailing any specific responsibilities so explaining how or the degree to which they are affected by the suit." Pet. App. 12. He made no attempt in the district court to show how this case could possibly keep him from carrying out his official duties. He did not do so for a very simple reason—he cannot.

It is not even necessary to look to Mr. Clinton's duties to establish the point. Given its simple factual predicate and the utterly barren record, this case could not be deemed to impose hardship upon the Executive Branch. It has nothing to do with Mr. Clinton's official duties. It is at bottom a very simple dispute about what happened in a very short encounter between two people in a room. There are only a handful of potentially important witnesses. One is Mr. Clinton himself, and presumably he has already spent with his counsel the short time required to obtain his recollection of events, for according to what he has publicly said, his recollection is nonexistent. By its nature, the case will not require the production of many

documents. Discovery and trial in this case will not be burdensome, and can be controlled by the ample powers of the district court to prevent any interference with Mr. Clinton's official duties. On the other hand, the dimming of memories and the risk that other evidence may be lost could prove fatal to corroboration of Mrs. Jones's claims, and possibly to the case itself.

In his brief, Mr. Clinton cites television reports describing "[r]espondent's counsel's . . . intention to pursue discovery aggressively." Pet. Br. 21. Even aggressive discovery, however, would not make this case very complex—as *Mr. Clinton's* own counsel has publicly acknowledged. Mr. Clinton's counsel has admitted that "[t]he President's case is not a complicated case," and has explained that "[i]f the President were Joe Schmo [*sic*], we wouldn't be wasting time with motions. I'd go to trial next week . . . ."[8] He has also publicly acknowledged that the trial in this case would be very short.[9] In short, of the sorts of lawsuits that one could imagine being brought against any individual, this one is just about the simplest—even in the view of Mr. Clinton's own counsel. But the Court certainly need not rely upon the press clippings offered by the parties to decide whether the case is really that simple. The allegations of the complaint bespeak their own factual simplicity, and Mr. Clinton can point to nothing in the record suggesting that this case cannot be quickly and easily tried.

Mr. Clinton has thus offered no case-specific facts to show that *this case* would actually be so burdensome that it would impair his ability to carry out his official duties. Instead, he and his *amici* devote most of their efforts to establishing—generally, and not with reference to *this* simple case—that his duties are so vast and litigation over personal matters so

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[8] Ruth Shalit, *The President's Lawyer*, N.Y. Times, Oct. 2, 1994, § 6, at 42, 47 (quoting Robert S. Bennett, Esq.).

[9] Frank Deford, *The Fabulous Bennett Boys*, Vanity Fair, August 1994, at 80, 85.

potentially burdensome that the two are bound to conflict, and a blanket rule requiring a stay is called for.

These arguments fail. The Chief Executive's duties are difficult and important, but the fact remains that they are, as Chief Justice John Marshall once observed, "not unremitting," and do not "demand his whole time for national objects." *United States* v. *Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14692d). That is no doubt because, as common sense makes clear, a President does not and cannot exercise all executive power himself; unlike legislative or judicial powers, executive powers can be, and for the most part, are, delegated. "Although the Constitution says that '[t]he executive Power shall be vested in a President of the United States of America,' Art. II, it was never thought that the President would have to exercise that power *personally*. He may generally authorize others to exercise executive powers, with full effect of law, in his place." *Mistretta* v. *United States*, 488 U.S. 361, 424 (1989) (Scalia, J., dissenting) (emphasis in original). The President's powers are mostly exercised through others. As a result, Presidents have always had time to fulfill personal commitments that do not involve the exercise of their Article II powers. Mr. Clinton's activities in the weeks after his brief was filed, which are a matter of public record, provide an apt example: a book that Mr. Clinton had authored was published; he spent a week vacationing in Wyoming, where he hiked and played golf; he spent a day in New York to attend a large birthday party in his honor; he spent four days riding a train through the Midwest; attended a political convention in Chicago; went on a two-day bus trip through another route in the Midwest and South; and spent a day in Little Rock, where he played golf.[10] There is, of

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[10] *E.g.*, *Clinton's Book Reinforces Administration's Themes*, Wash. Post, Aug. 22, 1996, at A8, col. 1; *Clinton Puts Off Politics As Vacation Winds Down*, Wash. Post, Aug. 17, 1996, at A15, col. 1; Alison Mitchell, *Clinton Has $10 Million Wish for Birthday Bash*, N.Y. Times, Aug. 19, 1996, at A1, col. 4; John F. Harris, *President Finds 'Heaven' on the Campaign Rails*, Wash. Post, Aug. 27, 1996, at A1, col. 3; Dan Balz, *Despite*

course, absolutely nothing inappropriate with any of these activities, because the business of the Executive Branch indisputably went on unimpaired. But they refute the claim that the demands of this "civil damages litigation against a sitting President would seriously impair the President's ability to discharge his constitutional responsibilities." Pet. Br. 20.

The past experience of Presidents with judicial and other legal proceedings likewise refutes Mr. Clinton's argument. Presidents have given evidence under judicial supervision even as to matters relating to their office, without any ill effect.[11] Mr. Clinton's own experience with the Whitewater affair by itself proves the point: In addition to giving grand jury testimony by videotape on more than one occasion, Mr. Clinton has given testimony by videotape in two separate criminal trials in the district court, which successfully and uncontroversially balanced his schedule with the rights of the litigants and the evidentiary needs of the case.[12] Indeed, given

Key Strategist's Fall, President Says 'Hope Is Back', Wash. Post, Aug. 30, 1996, at A1, col. 5; Todd S. Purdum, *Campaigns Over, the Candidates Take To the Road*, N.Y. Times, Aug. 31, 1996, at A1, col. 6; Todd S. Purdum, *Clinton Starts at the Beginning Once Again*, N.Y. Times, Sept. 2, 1996, § 1, p. 10, col. 1.

11 *E.g.*, *United States* v. *Fromme*, 405 F. Supp. 578, 582-83 (E.D. Cal. 1975); *see also United States* v. *Poindexter*, 732 F. Supp. 142, 143-146, 149-160 (D.D.C. 1990); 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 7.1 (2d ed. 1992); Laurence H. Tribe, *American Constitutional Law* 78 (2d ed. 1988) (rejecting the view "that the President [is] beyond the pale of judicial direction").

12 *United States* v. *McDougal*, No. LR-CR-95-173 (E.D. Ark.); *United States* v. *Branscum*, No. LR-CR-96-49 (E.D. Ark.) (Wright, J.); *see, e.g.*, Stephen Labaton, *Clinton Denies Any Link to Whitewater Case Loan*, N.Y. Times, May 10, 1996, § A, p. 1, col. 1; Alison Mitchell, *Clinton Is Ordered To Testify in Ex-Partners' Fraud Trial*, N.Y. Times, Feb. 6, 1996, § A, p. 16, col. 5; Ronald Smothers, *Judge Rules Clinton Testimony Will Be Videotaped for Trial*, N.Y. Times, Mar. 21, 1996, § A, p. 16, col. 1; Hugh Aynesworth, *Clinton Deposition Could Take 8 Hours, Judge Tells Lawyers*, Wash. Times, Apr. 18, 1996, part A, p. 18; Tim

the fact that they were indeed criminal proceedings, that Mr. Clinton is expressly a principal subject of the Independent Counsel's criminal investigation into Whitewater,[13] and given that this investigation encompasses a number of complex and disparate financial transactions, Mr. Clinton has surely already spent more time dea'ing with Whitewater than he ever will with this case. At the least, it is clear that he has had to do in the criminal realm the burdensome things he now claims he cannot do in any civil litigation against him: "to review [pleadings]; prepare and assure the veracity of discovery responses; retrieve and review documents; . . . review . . . other evidence in the case; review the opposition's pleadings and motions; . . . consult with counsel throughout the case"—and testify. Pet. Br. 23; *see also* Br. for United States 9. If the Independent Counsel's investigation has not kept Mr. Clinton from his official duties, neither will most personal civil cases—and *certainly* not *this* one.

The very trial judge who will try this case, indeed, was very solicitous of Mr. Clinton in one of the Whitewater trials,[14] and even came to Washington to moderate his videotaped deposition in that case. She also granted his request that the tape not be shown to third parties. Far from intruding into presidential business, she has managed litigation to prevent judicial intrusion. She would no doubt be very accomodating of Mr. Clinton's scheduling concerns in this case through the use of her case-management experience (and through *in camera* and *ex parte* conferences when needed), and could ensure that no presidential business would be impaired. And she would no doubt be highly cognizant of the public mistrust of

Weiner, *Clinton Testifies on Tape in Trial of Bankers*, N.Y. Times, July 8, 1996, § A, p. 11, col. 1.

13 Order, *In re Madison Guaranty Savs. & Loan Ass'n*, Div. No. 94-1 (D.C. Cir., Sp. Div. Aug. 5, 1994) (appointing Independent Counsel).

14 *United States* v. *Branscum*, No. LR-CR-96-49 (E.D. Ark.) (Wright, J.).

the justice system that would result if the President were not treated fairly in the conduct of litigation while he is President.

Only by *ipse dixit* does Mr. Clinton assert that, "if the Court allows private civil damages litigation to proceed against a sitting President, there is no reason to think that such lawsuits will be isolated events." Pet. Br. 23. As the court of appeals correctly noted, however, Mr. Clinton's assertion about a flood of future cases is "not only speculative, but historically unsupported." In the 220-year history of the Republic, there apparently have been "only three prior instances in which sitting Presidents have been involved in litigation concerning their acts outside official presidential duties." Pet App. 14 n.10; *see also* Br. for United States 6-7 n.4. The historical record reveals no presidential hardship caused by these cases. *Id.*[15]

The reason why there have been so few cases is precisely that identified in the opinion of the court of appeals. Very few people actually "traffic with the President in his *personal* capacity," Pet. App. 15, leaving even fewer who could have any conceivably colorable claim. It is fanciful to suggest that Presidents, who have absolute immunity from damages for their official acts under *Nixon* v. *Fitzgerald*, are "especially vulnerable to politically motivated 'strike suits' " for their unofficial acts. Pet. Br. 23. Even apart from the fact that plaintiffs would be few and far between, it is highly unlikely that political partisans would make litigation their attack vehicle of choice. As the Nation's political history shows, litigation is hardly necessary to accuse, attack, or embarrass a public figure. Indeed, if accusations against a public figure

[15] The lawsuit against President Truman, in particular, was filed just a few months before he became President, and was actively litigated during his term of office. Biegon, *Presidential Immunity*, *supra*, 82 Va. L. Rev. at 711-12. But "[d]espite the enormous demands of the Presidency during this tumultuous period in history, Mr. Truman did not find it necessary to seek the tolling of Mr. DeVault's suit." *Id.*; *see DeVault* v. *Truman*, 194 S.W.2d 29 (Mo. 1946).

are unjustified or purely partisan, one would think that litigation—which gives the public figure access to discovery and to a neutral forum in which to obtain vindication—is the *least* likely mode of attack. Mrs. Jones, for example, has filed a verified complaint, subjected herself to discovery, and has submitted herself to the authority of a neutral, nonpartisan forum empowered not only to dismiss her claims, but to impose severe sanctions under Fed. R. Civ. P. 11, the proper and effective tool for dealing with frivolous lawsuits, including purely private ones against Presidents.

Further, Mrs. Jones's life as a plaintiff is not attractive. She is subject to scurrilous comments in the media and minute examination of her past, is living in a controlled environment to prevent unwanted intrusion, and is exposed to intense interest and comments whenever she is recognized in public by all manner of people. It takes a person with great courage to sue someone with more influence, wealth, privilege, and power. If anything, Mrs. Jones's experiences would discourage others from ever suing a sitting President, especially since her case has now been delayed for more than two years.[16]

[16] To compound matters, a supposed delay in filing her claim is claimed by Mr. Clinton to suggest that Mrs. Jones's motives were bad. Pet. Br. 41-42. If a political strike suit was her desire, the presidential campaign of 1992 would have been the time to attempt to politically harm Mr. Clinton. The possibility that Mrs. Jones had no such motive, as proven by her lack of desire to sue for almost three years until she was libeled, does not suggest itself to Mr. Clinton, who can see no harm in any post-filing delay to Mrs. Jones's cause in quickly restoring her reputation.

An improper motive is also implied by Mr. Clinton when he notes that Mrs. Jones did not sue the publication that published the libel. Pet. Br. 3 n.1. But the standard of proving libel in the face of the First Amendment rights of the press is difficult.

2. Proper judicial case management is sufficient to protect the interests of the Executive Branch in this case and would not violate the separation of powers.

None of this is to say that the courts do not owe great deference to the presidency in overseeing litigation. What is needed in *this* case to protect the public's interest in the presidency, however, is exactly what the court of appeals prescribed. Emphasizing that "[t]he trial court has broad discretion to control the scheduling of events in matters on its docket," the court of appeals directed the district court to engage in "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. The district court was directed to "exercise its discretion in such a way that this lawsuit may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties." *Id.* at 13-14.

The decision below recognizes that a stay, not yet shown to be warranted in this case, may be required in some *other* case, or upon changed circumstances in this one. The court of appeals reversed the district court's stay of trial as an "abuse of discretion" because the district court failed to identify, and the record failed to present, any particularized reason to believe that a trial would hinder Mr. Clinton's execution of official duty. *Id.* at 13 n.9. The district court actually saw "no reason why the discovery and deposition process could not proceed as to all persons including the President himself," and pointed to no burden unique to a trial that could justify a different result. *Id.* at 71. Given this holding, and given that Mr. Clinton and the Government claim that discovery would be at least as burdensome (if not more so) than a trial, *see* Pet. Br. 21; Br. for United States 24, it should be clear that there was "no reason why [a trial] could not proceed" as well on this record and in the particular circumstances of this case.

The opinion under review emphasized that a different record could indeed lead to a different result, and that the district court is *required* to do everything necessary to allow the President to carry out his constitutional duties:

> If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitional responsibilities. Frivolous claims, a category with which the courts are quite familiar, generally can be handled expeditiously and ordinarily can be terminated with little or no involvement by the person sued.

Pet. App. 15. Thus, the trial judge remains completely free under the circuit court's decision to "halt[ ] or delay[ ] or reschedul[e] *any* proposed action by *any* party at *any* time should she find that the duties of the presidency are even *slightly* imperiled." Pet. App. 25 (Beam, J., concurring; emphasis added). And Mr. Clinton remains free "to pursue motions for rescheduling, additional time, or continuances." Pet. App. 16.

Contrary to Mr. Clinton's assertions, such motions would not "entangle[ ]" the Judicial and Executive Branches "in an ongoing and mutually harmful relationship," would not require "the President . . . to provide detailed information about the nature of pending Executive Branch matters," and would not involve "the trial judge . . . passing judgment on the President's priorities." Pet. Br. 29. The court of appeals' decision directs *deference* to the presidency and mandates "judicial case management *sensitive* to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13 (emphasis added). The circuit court's reference to the need to "control[ ] the scheduling of the case as necessary to avoid interference with specific, particularized, clearly

articulated presidential duties," Pet. App. 16, when read in context, clearly does not invite scrutiny of Executive Branch affairs; it was meant to convey that the proper approach to protection of the presidency lay not in a blanket granting of immunity, for which Mr. Clinton argued, but in deferentially scheduling around the President's duties. While Mr. Clinton may not take the approach he took the below—to assert that his duties do not permit litigation of this or any case until he leaves office—he may properly assert, for example, that on particular days or weeks, he is not available for deposition or trial testimony because of presidential business, or that any matter, including his deposition, must be interrupted for official business. The district court is "duty-bound . . . to protect the President's ability to fulfill his . . . responsibilities," and thus "duty-bound" to defer to him. Pet. App. 15. For again, "nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled." Pet. App. 25 (Beam, J., concurring).

Nothing in the court of appeals' decision requires or permits a trial judge to engage in judicial second-guessing of presidential priorities. The district court would have little opportunity to do so in any event. Busy and important people, like corporate chief executives and Cabinet secretaries, are frequently defendants in litigation—litigation far more complex than this—but their constant involvement in the cases is not required, because, like Mr. Clinton, they have good lawyers and assistants. But as the opinion below directs, Mr. Clinton will have even greater solicitude than would other defendants. While the only possible time other busy defendants would have to appear personally before the district court would be to testify, Mr. Clinton's appearance could be avoided by allowing him to testify by videotape. *Cf.* Pet. App. 23 (Beam, J., concurring); Pet. Br. 28 & n.25 (noting Mr. Clinton's videotaped testimony in Whitewater trials). Worry over money for defense costs and payment of a judgment is

even mitigated here, because Mr. Clinton is reportedly covered by insurance for an amount in excess of the *ad damnum* and by a legal defense fund.

Mr. Clinton attempts to assail the benefits of judicial deference by postulating remote hypotheticals that in any event do not advance his claim. His "national security" scenarios, for example, raise no realistic specter of danger to the functioning of the Executive Branch. The trial judge, under the court of appeals' decision, is to show deference to presidential interests in all circumstances, and surely there is no reason to believe that this deference will not be maintained when national-security issues are at stake. *Ex parte* and *in camera* procedures, moreover, may be used to protect the interests of the presidency. As for the hypothetical crisis offered by Mr. Clinton in which a President must "seek to maintain a pretense of 'business as usual' " and "simply having to ask a court for a change in the litigation schedule . . . . could be highly damaging," Pet. App. 31, any difficulty there would not be caused or exacerbated by the litigation; if the President were previously scheduled to give a speech, attend a conference, play golf, conduct a meeting, or go on a campaign tour, "simply having to [seek] a change in the . . . schedule" would be just as "damaging" in those circumstances as well.

Mr. Clinton's assertions about hypothetical litigation in state courts do not help his argument. This case is in federal court, and there is no need for this Court to address events in a state-court litigation that may never occur. And if a President is ever to be sued for personal acts in a state court, it would most likely be in a court of his own home state, a forum that would likely be convenient and familiar to him.[17]

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[17] One scenario would be assertion of purely state-law claims by a plaintiff from his own state, in which case there would be no diversity jurisdiction, 28 U.S.C. § 1332(a)(1) (1994). Such claims, given the citizenship of the parties, would most likely be brought in the state courts of that state. Another scenario would be the situation in which a diverse plaintiff chose to sue the President in the state courts of his home state,

In any event, Mr. Clinton's claim that " 'case management' by state trial courts is inconsistent with principles of federalism," Pet. Br. 33, actually stands those principles on their head. Under the principles of federalism repeatedly articulated by this Court, it may not be presumed that "state trial judges" will display "local partisan hostility," *id.* at 33-34, or that they will refuse to respect the constitutional duties of the President. The opposite presumption is required. "Article VI of the United States Constitution declares that 'the Judges in every State shall be bound' by the Federal Constitution, laws, and treaties." *Pennzoil* v. *Texaco*, 481 U.S. 1, 15 (1987). Accordingly, "[m]inimal respect for the state processes . . . precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). Even if this case had been brought in state court, this Court could not decide it by assuming that a state court would act unlawfully.[18]

The scheme of deference established by the court of appeals will not "work any judicial usurpation of properly executive functions," *Morrison v. Olson*, 487 U.S. 654, 695 (1988), and will not " 'prevent[ ] the Executive Branch from accomplishing its constitutionally assigned functions,' " *Mistretta v. United States*, 488 U.S. 361, 383, 384 (1989)

in which event the President would not be able to remove the action to federal court on diversity grounds, *id.* § 1441(b). But in all other cases in which a diverse plaintiff sued a President in state court on state-law claims, the action would of course be removable.

[18] Nor is there any merit to Mr. Clinton's suggestion that this case should be deferred because, given the President's position as a political official, it would supposedly thrust the courts into the "political arena." Pet. Br. 32. Needless to say, there is no "political person" doctrine, and in fact the federal courts find it frequently necessary to address cases that, unlike this one, actually do involve questions of law and fact having direct and controversial implications in the political arena. *E.g.*, *Shaw* v. *Reno*, 116 S. Ct. 1894 (1996) (redistricting); *Romer* v. *Evans*, 116 S. Ct. 1620 (1996) (homosexual rights).

(quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)). It will instead ensure that this case will not cause even the slightest impairment of presidential business.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT, ON THIS BARREN FACTUAL RECORD, THERE IS NO BASIS FOR A STAY OF THE TRIAL OR THE LITIGATION GENERALLY.

Mr. Clinton also claims error in the Court of Appeals' reversal of what the District Court *itself* called a grant of a "limited or temporary *immunity* from trial," an "immunity from trial as [*Nixon* v.] *Fitzgerald* seems to require." Pet. App. 68 (emphasis added); *see* Pet. Br. 45-47. Citing this Court's decision in *Landis* v. *North American Co.*, 299 U.S. 248 (1936), which governs the issuance of discretionary litigation stays, Mr. Clinton argues that the district court did not abuse its discretion in ordering a postponement of trial. But he made no record below that would justify *any* stay whatsoever under *Landis*. Accordingly, the Court of Appeals correctly found that what the District Court ordered—a postponement of the trial until perhaps the year *2001*—not only was "the functional equivalent of a grant of temporary immunity," but was a manifest abuse of discretion even if reviewed under the settled law governing discretionary litigation stays. Pet App. 13 n.9.[19]

In *Landis* v. *North American Co.*, 299 U.S. 248 (1936), the Court did indeed hold that "the power to stay proceedings is incidental to the power inherent in every court to control the

[19] The district judge cited her equity powers and Fed. R. Civ. P. 40, together with a finding of a "temporary or limited immunity from trial," to put the case on hold as far as a trial is concerned. Pet. App. 70-71. But her equity powers and Rule 40 were invoked because she incorrectly found an immunity from trial, as both she and the court of appeals made clear. *Id.*; *accord id.* at 13 & n.9. Thus, if her holding as to an immunity from trial fails, so should the alternative grounds for postponement fail as an abuse of discretion.

disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* at 254. But the Court made clear that a stay of litigation could be granted "[o]nly in rare circumstances." *Id.* at 255. In particular, "the *suppliant* for a stay must make out a *clear* case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Id.* (emphasis added). "[T]he burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the . . . suppliant[ ] for relief, and discretion [is] abused if the stay [is] not kept within the bounds of moderation." *Id.* at 256.

Under *Landis*, it was Mr. Clinton's "heav[y]" burden to show why a stay was required. As stated above, however, he made no effort to show why the litigation of *this* simple case would *in fact* present him, or the presidency, any "clear . . . hardship or inequity." Rather than try to make such a showing—which, given the simplicity of this case, was impossible to make—Mr. Clinton resorted to reliance on hypothetical circumstances. He chose to argue in the abstract, as he does here, that litigation generally (including a hypothetical torrent of future cases) could someday pose an undue burden upon his Office. Apart from being incorrect, that argument fails to meet the *Landis* criteria. It fails to establish—indeed, it fails really to assert—that there will in fact be "hardship or inequity" in *this* case, or that *this* case was of such an "extraordinary public moment," *Landis*, 299 U.S. at 256, that any part of it should not be allowed to proceed.

The court of appeals was entirely faithful to *Landis* in reversing the district court's categorical and indefinite postponement of trial. In granting trial "immunity" to Mr. Clinton, far from considering "the particular facts at hand" (Pet. Br. 45), the district court made no finding that Mr. Clinton had made any showing of an actual "clear case of hardship," and cited *no* facts that would support such a finding (and could not, because, again, Mr. Clinton did not even try to present

such facts). The closest the district court came to a finding was a conclusory statement that "[n]either is this a case that would likely be tried with few demands on Presidential time"– a statement that not only came without any indication of whether those demands would amount to clear inequity or hardship, but was manifestly insupportable in a case centering upon a short encounter between two people in a room.

On the other side of the balance, as Judge Beam explained, the danger of harm to Mrs. Jones is manifest. She "faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time." Pet. App. 17. The district court not only incorrectly disregarded this harm, but ignored Mrs. Jones's well-pleaded reasons why the commencement of this action was delayed, and ignored the fact that public aspersions upon Mrs. Jones reputation had made it necessary for her to proceed. Complaint ¶¶ 41-51.[20] Beyond this, the passage of time contemplated by the District Court's order—possibly into the next century—was surely "immoderate" and impermissible under *Landis*. Even in "cases of extraordinary public moment"—which this one, given the lack of burden, is not—*Landis* requires that a delay cannot be "immoderate in extent." 299 U.S. at 256. In *Landis* itself, the Court found "the limits of a fair discretion" to have been "exceeded" by a stay that had suspended "the proceedings in the District Court . . . more than a year." 299 U.S. at 256.

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[20] Throughout the briefs of Mr. Clinton's Solicitor General and academic *amici*, the importance of Mrs. Jones' case is downplayed because of a supposed delay in filing her case. As noted above, public defamation in early 1994 caused her to proceed immediately to file a case that would not otherwise have been brought when few people knew about the harassment in 1991. Also to be noted is that the defamation action had recently accrued when she sued in May 1994. Of course, the speed of filing has never, so far as we can tell, governed the speed of litigation. Otherwise, a litigant Smith, whose cause of action arose after another plaintiff, Jones, had filed a similar action just before the limitations deadline, would have precedence on the court's docket even if Smith filed one day after his cause of action arose!

The district court was neither presented with, nor did it point to, a record of "clear hardship and inequity" as required by *Landis*. What the district court really did was what it candidly said it had done: to create a new rule of law establishing a "limited or temporary *immunity* from trial," a new kind of immunity that it believed, quite incorrectly, "[*Nixon* v.] *Fitzgerald* seems to require." Pet. App. 68, 70 (emphasis added). Apart from being based upon a clear error of law, the district court's ruling was an abuse of discretion because it was *not* an exercise of discretion. Reversal of the district court's "stay" order, if anything, was all but *required* under *Landis*.

Mr. Clinton makes a final effort to restore the district court's "trial immunity" order by contending that the court of appeals lacked jurisdiction to review it. Pet. Br. 43-45. This argument, which Mr. Clinton has not even mentioned in his list of questions presented, is meritless.

In appealing the denial of his claim of "immunity" (which was the word Mr. Clinton repeatedly used in both courts below to describe his claim), Mr. Clinton argued that the district judge's decision was "inherently inconsistent," that the "result that the District Court arrived at here—deferring trial but not discovery"—was "illogical" because principles of "immunity" under *Nixon* v. *Fitzgerald* required deferral of both. Opening Brief of Appellant President William Jefferson Clinton at 10, 23, *Jones* v. *Clinton*, No. 95-1050 (8th Cir. filed Apr. 5, 1995). His "statement of issues" and list of principal authorities in that court thus read:

> 1. Whether the Constitution and principles of separation of powers require the dismissal without prejudice of this civil damages suit against an incumbent President and his co-defendant, and the tolling of any statutes of limitation applicable to the claims asserted therein, until such time as the President is no longer in office.
>
> *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); . . . .

> 2. Whether the District Court erred in holding that the Supreme Court's decision in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), requires that sitting Presidents be immune only from trial, but not from the demands of litigating pretrial motions and conducting discovery, which are equally burdensome and distracting to the Office of the President.
>
> *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); . . . .
>
> 3. Whether the District Court, having found that it is not in the national interest to distract the President with the burdens of trial in private civil litigation, erred in refusing on the same basis to stay the proceedings in their entirety, until such time as the President leaves office.
>
> *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982); . . . .

Id. at vii-ix.

All of Mr. Clinton's questions presented in the Eighth Circuit were to the same effect: *Nixon* v. *Fitzgerald* and the principles of immunity expressed in that case required the postponement of *both* discovery and trial (regardless of whether the postponement takes the form of a stay or dismissal). Jurisdiction over Mr. Clinton's appeal was premised upon the principle that "denials of immunity are subject to appeal as of right under section 1291 [and] the collateral order doctrine." *Id.* at vii (citing *Nixon* v. *Fitzgerald*, *supra*); *accord* Pet. Br. 4 n.3 (citing *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985)). Mrs. Jones cross-appealed, arguing (as she does here) precisely the converse of what Mr. Clinton was arguing—namely, that *Nixon* v. *Fitzgerald* justified *neither* the postponement of discovery nor the postponement of trial—and argued that jursidicton over her cross-appeal was proper under principles of pendent appellate jurisdiction.

The Eighth Circuit correctly held that the cross-appeal could properly be entertained as an exercise of pendent appel-

late jurisdiction. As this Court has recognized, pendent appellate jurisdiction is a concept that has been "endorsed" by all the federal courts of appeals, *Swint* v. *Chambers County Comm'n*, 115 S. Ct. 1203, 1209 n.2 (1995) (citing cases from each Circuit); it is typically held to apply when the pendent issue is "inextricably intertwined with" the primary issue on review, *id. at 1212*. And if ever there were a case where such jurisdiction was justified, this is it. For the question whether Mr. Clinton is entitled to a postponement of just a trial, far from being "very distinct" (Pet. Br. 44) from the question whether he is entitled to a postponement of the litigation entirely, is part and parcel of it. Indeed, as Mr. Clinton's own questions presented below show, the questions were in his view one and the same. In both the district court and the court of appeals, *he* argued that he was entitled, *as a matter of law*, to an immunity or stay as to *all* proceedings, *including* the trial, for *one* reason, and one reason *alone*—the fact that he is President of the United States. Mrs. Jones' cross-appeal argued a point that indisputably was inextricably intertwined with, indeed subsumed within, Mr. Clinton's claim—namely, to borrow the district court's words, whether he was entitled to "a temporary or limited immunity from trial [under] *Fitzgerald*." Pet. App. 70. The court of appeals reached the obvious conclusion that both appeals

> are resolved by answering one question: is a sitting President entitled to immunity, for the duration of his presidency from civil suit for his unofficial acts? It is difficult to imagine issues more "intertwined" than these, where answering one question of law resolves them all.

Pet. App. 5 n.4.

Finally, nothing in this Court's decision in *Swint* v. *Chambers County Commission*, *supra*, casts doubt upon the exercise of pendent jurisdiction in this case. At issue in *Swint* was a purported exercise of " 'pendent party' " appellate jurisdiction, *Swint*, 115 S. Ct. at 1206; there were "parties who were not involved in the appealable order but were parties to

the pendent order," *Gilda Marx, Inc.* v. *Wildwood Exercise, Inc.*, 85 F.3d 675, 678 (D.C. Cir. 1996) (per curiam). One group of defendants appealed the denial of their summary judgment motion, which was based upon a claim of qualified immunity, that appeal was plainly proper under *Mitchell* v. *Forsyth*, *supra*. *See* 115 S. Ct. at 1207. Another defendant, the Chambers County Commission, appealed the denial of its separate summary judgment motion, which did not involve the immunity issue and was not independently appealable. *Id.* at 1207-08. This Court, noting that "[w]e need not definitively or preemptively settle here whether or when it may be proper for a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable," held that pendent appellate jurisdiction was not proper because the parties did not, and could not, "contend that the District Court's decision to deny the Chambers County Commission's summary judgment motion was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter." *Id.* at 1212.

As noted in *Swint*, this Court "ha[s] not universally required courts of appeals to confine review to the precise decision independently subject to appeal." *Id.* at 1211 (citing cases). And since *Swint*, the courts of appeals have continued to recognize the validity of pendent appellate jurisdiction, and have carefully confined the exercise of that jurisdiction to questions that are "inextricably intertwined" with those as to which independent bases of jurisdiction exist.[21] There is no

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[21] *See, e.g.*, *Martin* v. *Memorial Hospital*, 86 F.3d 1391, 1401 (5th Cir. 1996) (noting that *Swint* implied that pendent appellate jurisdiction was proper where "inextricably intertwined" standard was met); *Eagle* v. *Morgan*, 88 F.3d 620, 628 (8th Cir. 1996) (applying "inextricably intertwined" standard, and exercising pendent appellate jurisdiction); *Gilda Marx, Inc.* v. *Wildwood Exercise, Inc.*, 85 F.3d 675, 678-79 (D.C. Cir. 1996) (per curiam) (recognizing continued validity of pendent appellate jurisdiction under "inextricably intertwined" standard); *Cooper* v. *Town*

reason to depart from that course here. No pendent party was involved. And the pendent appellate question, whether there existed a "temporary immunity from trial," was bound up in the question that Mr. Clinton presented, which was whether there was a "temporary immunity" from all proceedings; the pendent issue was an integral part of the decision that Mr. Clinton appealed. There was thus no danger here of turning a "collateral order[ ] into [a] multi-issue interlocutory appeal ticket." *Swint*, 115 S. Ct. at 1211. Indeed, it would have been wasteful and illogical for the Eighth Circuit to have held that Mr. Clinton was not entitled to the full immunity from litigation that he claimed, but to have held itself powerless to correct the district court's erroneous holding that there existed a "temporary immunity from trial." This Court's cases "indicate that [the courts of appeals] should give the jurisdictional statutes a 'practical contstruction,' " *Gilda Marx* v. *Wildwood Exercise*, *supra*, 85 F.3d at 678(quoting *Swint*, 115 S. Ct. at 1207-08 (citation omitted)), and such a construction surely requires, at a minimum, the exercise of pendent jurisdiction here.

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of East Hampton, 83 F.3d 31, 36 (2d Cir. 1996) (same); *Brennan* v. *Township of Northville*, 78 F.3d 1152, 1157 (6th Cir. 1996) (same); *Dolihite* v. *Maughon*, 74 F.3d 1027, 1035 (11th Cir. 1996) (same), *petition for cert. filed* (June 19, 1996); *Sevier* v. *City of Lawrence*, 60 F.3d 695, 701 (10th Cir. 1995) (same).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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